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In the Supreme Court of the United States

REGINALD A. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL., PETITIONERS

v.

CHARLES E. AUSTIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause is satisfied by the application of informal, non-trial-type procedures in making the decision that prison security concerns justify placing an inmate in a supermaximum-security facility.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Due Process Clause requires prison officials to apply formal, trial-type procedures in determining whether institutional security concerns warrant placing an inmate in a supermaximum-security facility. The Federal Bureau of Prisons (BOP) maintains highly restrictive, non-punitive housing at the Administrative Maximum Security facility in Florence, Colorado (ADX Florence), and the United States Penitentiary in Marion, Illinois (USP Marion), whose conditions are comparable in some respects to those at the Ohio State Penitentiary (OSP), the "supermaximum, or supermax, facility" involved in this case. Pet. App. 1a. The BOP's most restric-

tive non-punitive housing unit is the Control Unit at ADX Florence, which is designed for "inmates who are unable to function in a less restrictive environment without being a threat to others or to the orderly operation of the institution." 28 C.F.R. 541.40(a). The Control Unit currently houses 49 inmates. At both ADX Florence and OSP Marion, BOP also maintains high-security and general-population units that currently house approximately 800 inmates with conditions slightly less restrictive than the Control Unit but still comparable in some ways to OSP's.

Although entry to the Control Unit is preceded by an extensive process involving the inmate, see 28 C.F.R. 541.40 *et seq.*, BOP generally does not apply the kind of procedures that the court of appeals viewed as constitutionally required before transferring an inmate to the Florence and Marion facilities. See *BOP Program Statement No. 5100.07, Security Designation and Custody Classification Manual*, Ch. 10 (Jan. 31, 2002) (setting forth inmate-transfer policy) <www.bop.gov/progstat/5100-007.pdf>. Because affirmance of the court of appeals' decision could have a detrimental impact on BOP's ability to make inmate-transfer decisions in the paramount interest of prison security, the United States has a substantial interest in the resolution of the question presented.

STATEMENT

1. In May 1998, Ohio opened OSP, its supermax facility, in response to an April 1993 riot at what was then its most secure maximum-security prison, the Southern Ohio Correctional Facility. Pet. App. 2a-3a. Supermax facilities, employed in many States and in the federal prison system, house the most dangerous elements of the prison population and are intended to make the rest of the general prison population safer and easier to control. *Id.* at 2a. According to the National Institute of Corrections, at least 30 States

and BOP had supermax housing as of 1999. Chase Riveland, *Supermax Prisons: Overview and General Considerations* 1 (Nat'l Inst. of Corr. Jan. 1999). "The trend toward proliferation of supermax housing would appear to be at least partially related to the belief that maintaining order in the larger part of a prison—or an entire corrections system—is enhanced by isolating the most serious and chronic troublemakers from the general population." *Id.* at 5.

The conditions at OSP are typical of such supermax facilities. Inmates there are subject to greater restrictions than inmates in other Ohio prisons, including those in administrative segregation at other facilities. These include "extra limitations on personal property rights, access to telephones and counsel, outside recreation, and communication with other persons." Pet. App. 4a-5a. Inmates spend 23 hours per day in their individual cells, which are designed to prevent communication between them. *Id.* at 4a. Inmates have access to two indoor recreation rooms during the one hour per day in which they are permitted to leave their cells and have recreation either alone or with one other inmate. *Ibid.* Inmates having visitors are separated from them by solid windows and are strip-searched whenever they leave and reenter the cellblock. *Ibid.*

The Ohio Department of Rehabilitation and Correction (ODRC) assigns each inmate a security rating of Level 1 (lowest risk) to Level 5 (highest risk) based on a multi-factor assessment of the risk he presents. Pet. 6. A prisoner receives an initial classification upon incarceration, which is subject to change at any time during the prisoner's term. *Ibid.* Prisoners rated Level 1 through Level 4 are housed in prisons throughout the State; Level 5 inmates are automatically housed at OSP unless they are seriously mentally ill. *Ibid.*; see Pet. App. 124a.

The procedures used to place inmates in Level 5 are set forth in ODRC Policy 111-07, the relevant version of which

was scheduled to take effect on March 1, 2002, Pet. App. 122a-140a, had it not been preempted by the district court's decision, *id.* at 47a-121a. Under Policy 111-07, certain ODRC officials may initiate the placement of an inmate in Level 5 by completing a "Security Designation Long Form" that reviews and rates the inmate's characteristics and conduct. *Id.* at 127a. The Warden then designates a classification committee to determine whether the inmate meets one or more of certain heightened-security issues set forth in the "Level 5 criteria." *Ibid.* Those include, *inter alia*, having: engaged in "assaultive and/or predatory behavior"; committed an offense before incarceration that "constitutes a current threat to the security and orderly operation of the institution and to the safety of others"; "lead [*sic*], organized, or incited a serious disturbance or riot"; possessed or conveyed "major contraband"; been identified as "a leader, enforcer, or recruiter" of a prison gang; "escaped[] or attempted to escape"; or "knowingly exposed others to the risk of contracting a dangerous disease." *Id.* at 127a-129a. After providing the inmate with at least 48 hours' notice and the opportunity to be heard in person and in writing, the committee determines whether "the inmate has met one of the criteria * * * and whether the inmate should be placed in level 5" and makes a written recommendation to the Warden. *Id.* at 129a-130a. If the Warden disagrees with a recommendation for Level 5 classification, the inmate is not placed at OSP; if the Warden agrees that Level 5 classification is appropriate, the prisoner is notified and given 15 days to object. *Id.* at 6a. The matter is forwarded to the Bureau of Classification for "final decision." *Ibid.*

Within 30 days of an inmate's placement at OSP, OSP staff reviews the inmate's file "to determine if [he has] been properly classified" and may recommend a security reduction to the Warden. Pet. App. 132a. If the Warden agrees, the recommendation is sent to the Bureau of Classification

for final decision. *Ibid.* If the staff determines that Level 5 placement is appropriate, the staff meets with the inmate to advise him, *inter alia*, "whether release to a general population institution in three years or less appears reasonably possible." *Ibid.*

Review of each OSP inmate's security classification is made "at least annually" in a "supervision review." Pet. App. 137a. After providing the inmate with 48 hours' notice and an opportunity to participate orally and in writing, a three-member classification committee performs a "comprehensive review of the inmate's institutional adjustment and behavior," and, using "professional correctional judgment," makes an assessment of the "risk to safety and security" posed by the inmate based in part on a non-exhaustive list of factors. *Id.* at 137a-139a. The committee then prepares a recommendation "to reduce or continue the inmate's security level," which must include the "basis for its decision and the factors relied upon." *Id.* at 139a. That recommendation is subject to the same review process as the initial transfer recommendation. *Id.* at 139a-140a.

2. Respondents, inmates who are or may be housed in the OSP, filed a class action under 42 U.S.C. 1983 in the United States District Court for the Northern District of Ohio on January 1, 2001, claiming, *inter alia*, that the procedures used to place and keep prisoners at OSP are deficient under the Due Process Clause of the Fourteenth Amendment. Pet. App. 1a, 5a; Pet. ii.

Following a bench trial, the district court ruled that the procedures established by Policy 111-07 fail to satisfy due process. Pet. App. 47a-121a. The court concluded first that respondents have a state-created liberty interest in avoiding placement at OSP. *Id.* at 96a. The court next held that assignment procedures had to meet the requirements of *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). *Id.* at 105a. In particular, the court ordered petitioners to supplement their procedures

by providing each inmate with, *inter alia*: advance "written notice of all the grounds believed to justify his placement at Level 5 and a summary of the evidence that [petitioners] will rely upon for the placement" on pain of being barred from relying on any grounds not mentioned (*id.* at 40a); the ability to call "reasonable witnesses," including other inmates, and to "present documentary evidence" at the classification committee hearing (*ibid.*); a copy of each recommendation and the final decision, which must include a "detailed and specific justification" (*id.* at 41a-43a); and notice, at least twice annually, of "what specific conduct is necessary for that prisoner to be reduced from Level 5" (*id.* at 44a).[1]

3. A divided panel of the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-35a. The majority held first that "inmates enjoy a liberty interest in not being placed at OSP" because OSP "constitutes an atypical and significant hardship" under *Sandin* v. *Conner*, 515 U.S. 472 (1995). Pet. App. 14a. In so holding, the majority relied on the fact that conditions at OSP are more restrictive than those prevailing in Ohio's other prisons. *Ibid.*

The majority next upheld the district court's modifications to Policy 111-07 on the ground that they reflected a proper balancing of the private and governmental interests under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The majority concluded that respondents' private interest in avoiding OSP placement is "necessarily * * * of a weight requiring greater due process protection" because "[a]ny liberty interest which passes *Sandin*'s [atypicality] threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*." Pet. App. 22a & n.12. The majority also weighed the value of the district court's additional procedural requirements in respondents' favor, noting the district court's "findings concerning past erroneous and haphazard placements at OSP" (*id.* at 22a) and asserting that the cost of complying with the new requirements do not "outweigh [their] probative and protective value" (*id.* at 23a). Finally, the majority acknowledged the governmental "interest in guaranteeing the safety of [prison] staff and inmates through the swift isolation of dangerous inmates," but concluded that petitioners could use administrative segregation, "which does not require extensive process," as an alternative for assuring safety. *Id.* at 22a.

Judge Rogers concurred in part and dissented in part. Pet. App. 26a-35a. Judge Rogers disagreed with the majority's "reli[ance] on *Sandin* to conclude that the liberty interest in this case is particularly weighty," explaining that "a hardship that is only marginally atypical and marginally significant should only be given marginal weight in [a *Mathews*] analysis." *Id.* at 31a. Judge Rogers stated that he would nevertheless "uphold all of the procedural requirements imposed by the district court except the requirement that officials limit their placement decision to those matters detailed in the notice to the inmate." *Id.* at 29a. That requirement, he explained, burdened petitioners with "cull[ing] through often voluminous records and not[ing] every potentially relevant fact" in the notice, but did not increase the accuracy of the decisionmaking process. *Id.* at 33a.

SUMMARY OF ARGUMENT

Under the flexible and context-specific analysis that governs procedural due process claims, the procedures accorded

[1] The district court also required that classification hearings be recorded; prisoners receive notice of the committee's intent to rely on confidential testimony; the Warden engage in "independent review" of the committee's recommendation; the inmate be provided with notice of the Warden's reliance on any confidential witness statement not already disclosed; and no one involved in the inmate's original classification take part in the prisoner's appeal to the Warden or to the Bureau of Classification. Pet. App. 20a-21a.

to prisoners placed in Ohio's supermaximum facility are more than sufficient to satisfy the Constitution (assuming that the placement in such a facility even implicates a liberty interest that triggers due process scrutiny). Formal, trial-type procedures are not mandated; indeed, even less formal procedures than the State has adopted here are adequate, in light of the substantial deference owed to prison officials in making predictive judgments designed to maintain institutional security.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), this Court established a framework for evaluating the sufficiency of particular procedures that weighs the "private interest" at stake against the governmental interest advanced by the challenged policy, and considers both the risk that the private interest will be erroneously deprived by the procedures provided and the burden of additional process on the government. In considering due process claims in the prison setting, the guiding principle has been one of substantial deference to prison administrators, based on the recognition that they possess superior expertise, especially with respect to issues pertaining to institutional security. See *Sandin* v. *Conner*, 515 U.S. 472, 482-483 (1995).

The court of appeals' decision rejecting Ohio's Policy 111-07 reflects a misapplication of *Mathews* and a misunderstanding of the fundamentally discretionary and predictive nature of the inmate-placement decision. First, the court placed too much weight on the liberty interest it found respondents to have in avoiding transfer to OSP. Beginning with *Meachum* v. *Fano*, 427 U.S. 215 (1976), this Court has consistently held that a prisoner possesses no liberty interest in avoiding transfer to a prison with substantially more burdensome conditions. When this Court held in *Sandin* that state action creates a liberty interest when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 484, it reaffirmed

Meachum. Thus, placement in the more burdensome conditions at OSP, compared to conditions in the general prison population, does not even implicate a liberty interest, let alone one of substantial weight. But even if such placement were to pass the *Sandin* threshold, it would mean only that there is a liberty interest to evaluate. It would not alter the strong interest of prison officials in maintaining safety and security nor erode the deference owed to the predictive judgments of prison officials.

Second, the court of appeals failed to accord sufficient weight to Ohio's compelling interest in promoting institutional security. Indeed, this Court has ranked that interest as the most fundamental responsibility of prison administrators, to whom deference is owed. *Sandin*, 515 U.S. at 482-483. In approving numerous modifications to an already extensive process that Ohio provides its inmates before placing them in OSP, the court of appeals did not pay any deference to Ohio's judgment about the best manner in which to effect an inmate placement.

Finally, the court of appeals erred in concluding that the district court's modifications—designed to aid the inmate in eliciting specific facts—would enhance the inmate-transfer decisionmaking process. The decision whether to transfer an inmate in order to promote institutional security is a fundamentally predictive judgment that turns largely on subjective evaluations of numerous factors rather than the narrow resolution of specific historical facts. The highly discretionary nature of the inmate-placement decision simply does not lend itself to the type of rigid procedures that the courts below imposed.

Indeed, even more informal procedures than employed by Ohio are constitutionally sufficient. BOP effects the transfer of some inmates with chronic behavioral problems into its highest-security prisons without the formal hearing procedures called for by the court of appeals. Like Ohio, BOP has

a three-tiered recommendation and review process for inmate transfers to USP Marion and to ADX Florence (other than the Control Unit). Unlike in Ohio, however, the inmate does not directly participate in that process. Instead, the inmate may challenge a placement decision through the administrative remedy program. See 28 C.F.R. 542.10 *et seq.* That procedure provides the inmate with an after-the-fact formal appeal process. BOP's informed judgment that it promotes sound prison management to make inmate-transfer decisions in this manner supports Ohio's position that the court-imposed modifications requiring even greater inmate participation in the placement process will burden the placement decision without providing any concomitant benefit.

ARGUMENT

OHIO'S PROCEDURES FOR PLACEMENTS IN ITS SUPERMAXIMUM FACILITY ARE MORE THAN ADEQUATE TO SATISFY DUE PROCESS

It is settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 569 (1972). Although petitioners argued below that respondents do not have a liberty interest in avoiding placement in OSP (see Pet. App. 11a, 47a), they do not press that argument before this Court. Instead, petitioners assume *arguendo* that respondents have such an interest, but challenge the court of appeals' conclusion that the process provided is insufficient. Pet. i, 11. Respondents do not have a liberty interest in which facility they are housed based on differences in non-punitive conditions. But assuming that a liberty interest is implicated in this case, the court of appeals' holding that Ohio's procedures fail to protect it is incorrect. The cardinal principle in due process analysis is one of flexibility to take into account the relevant context, the

competing interests, and the nature of the challenged decision. Here, where the interest is one of lawfully-incarcerated prisoners in whether they are placed in a supermaximum-security facility, and the judgment requires an assessment by prison officials of a multiplicity of subjective and predictive factors about what placement will best promote institutional security, due process does not mandate any form of heightened trial-type procedures or elaborate notice-and-hearing rules. To the contrary, the fundamentally predictive decision of prison officials can be made, in compliance with the Constitution, with far less process than Ohio provides. Accordingly, the judgment of the court of appeals should be reversed.

I. *MATHEWS* V. *ELDRIDGE* PROVIDES THE APPROPRIATE FRAMEWORK FOR DETERMINING WHAT PROCESS IS CONSTITUTIONALLY REQUIRED TO PROTECT AN ASSERTED LIBERTY INTEREST

As the Court has repeatedly recognized, the determination of what process is due:

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. *Eldridge*, 424 U.S. 319, 335 (1976); see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion) (citing cases). Thus, any liberty interest that a prisoner has in avoiding placement at a supermaximum facility must be weighed against the prison's interest in maintaining institutional security, an interest it seeks to advance by making

placement determinations that fundamentally reflect discretionary, predictive judgments.

1. The Court's decisions in the prison context exemplify the principle that the type of process due varies substantially based on a context-specific balancing of the *Mathews* factors. In *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court addressed the adequacy of the procedures employed by Nebraska officials in deciding whether to discipline inmates for misconduct by placing them in segregated confinement and revoking "good time" credits. *Id.* at 563-572. The Court held that the inmates had a state-created liberty interest in avoiding those sanctions, *id.* at 558, which could "postpone the date of eligibility for parole and extend the maximum term to be served," *id.* at 561. But the Court concluded that the Nebraska prison officials were required to apply only "some, but not all," *id.* at 571, of the formal-trial-type procedures the Court had mandated in *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972), for final parole revocations. In particular, the Court held that a prisoner facing misconduct charges must be given 24 hours' advance written notice of the charges against him; the right to call witnesses and present documentary evidence in a manner consistent with institutional security; if illiterate, staff assistance in preparing a defense; an impartial tribunal; and a written statement explaining the basis of the tribunal's decision. *Wolff*, 418 U.S. at 563-570. The Court refused, however, to require that prisoners be given counsel or the opportunity to cross-examine witnesses, citing the risk of "disruption" in allowing confrontation and noting that the insertion of counsel would "inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals." *Id.* at 568-570.

Subsequently, in a prisoner's challenge to administrative segregation, this Court rejected the contention that *Wolff* procedures were required. *Hewitt* v. *Helms*, 459 U.S. 460,

466 (1983).[2] Applying the *Mathews* framework, the Court first explained that the inmate's "private interest [was] not one of great consequence" because: "[h]e was merely transferred from one extremely restricted environment to an even more confined situation"; "the stigma of wrongdoing or misconduct d[id] not attach to administrative segregation"; and segregation would not "have any significant effect on parole opportunities." *Hewitt*, 459 U.S. at 473. The Court further explained that, by contrast, the State's interest in confining inmates in administrative segregation was of "great importance," not least because "[t]he safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." *Ibid.*

Finally, the Court focused on the nature of the challenged decision. The Court observed that "assessing the seriousness of a threat to institutional security" requires prison administrators to make "purely subjective evaluations and * * * predictions of future behavior" based not only on "the specific facts surrounding a particular incident," but also on "the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." 459 U.S. at 474. That assessment, the Court concluded, does not "involve[] decisions or judgments that would * * * be[] materially assisted by a detailed adversary proceeding." *Id.* at 473-474.

Accordingly, the *Hewitt* Court held that the prison authorities were "obligated to engage only in an informal, nonadversary review of the information supporting [the inmate's] administrative confinement * * * within a reason-

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[2] The *Hewitt* Court's antecedent methodology for identifying a protected liberty interest was rejected in *Sandin* v. *Conner*, 515 U.S. 472, 480-484 & n.5 (1995). Nevertheless, the *Hewitt* Court's application of *Mathews* remains instructive.

able time after confining him." 459 U.S. at 472.[3] The Court stated that "[a]n inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation." *Id.* at 476.[4]

2. These cases illustrate that the requirements of due process are necessarily "flexible and variable dependent upon the particular situation being examined." *Hewitt*, 459 U.S. at 472; see *Wolff*, 418 U.S. at 560 ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.") (quoting *Cafeteria & Rest. Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961)). "[F]lexibility is necessary to gear the process to the particular need." *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 13 (1979) (citing *Mathews*, 424 U.S. at 335).

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[3] The similarly predictive and multi-factored nature of the parole-release determination prompted the Court in *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979), to hold that the Due Process Clause did not require Nebraska to provide a formal, adversarial process. Because the parole-release determination involved "analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole decisionmakers in predicting future behavior," *id.* at 13, the Court concluded that "[p]rocedures designed to elicit specific facts, such as those required in * * * *Wolff*," *id.* at 14, would not enhance the decisionmaking process. As with *Hewitt*, that aspect of the Court's decision remains instructive after *Sandin*, which rejected *Greenholtz*'s methodology for identifying a protected liberty interest. See note 2, *supra*.

[4] The Court made clear that the State did not have to provide the inmate a hearing, explaining that "[o]rdinarily a written statement by the inmate" is sufficient. *Hewitt*, 459 U.S. at 476. The Court further observed that "administrative segregation may not be used as a pretext for indefinite confinement of an inmate," and that "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates." *Id.* at 477 n.9.

In balancing the relevant factors in the prison context, the Court has stressed that "one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented * * * in a state prison." *Hewitt*, 459 U.S. at 472 (internal quotation marks omitted). The Court has also been guided by the principle that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Ibid.* (quoting *Bell* v. *Wolfish*, 441 U.S. 520, 547 (1979)). Accord *Sandin*, 515 U.S. at 482-483.

In light of this Court's emphasis on the flexibility inherent in procedural due process, *Wolff* and *Hewitt* are properly viewed not as providing the only two discrete bundles of procedures that are available for prisons, but as benchmarks that aid the determination of what process is due under the *Mathews* framework. "Thus[,] to the extent, for instance, that *Hewitt* instructs that additional procedures with respect to 'forward-looking' determinations are less likely to increase the accuracy of such decisions * * *, that guidance may appropriately be applied—not categorically but as part of the weighing—in other cases involving different procedures and different * * * interests." Pet. App. 29a (Rogers, J., concurring and dissenting). Here, although the court of appeals correctly rejected applying a "mechanistic" approach, *id.* at 18a, it erred in its application of the *Mathews* factors by assigning too much weight to the asserted liberty interest, too little weight to the State's interest in promoting long-term security in its prisons, and far too much value to the modified procedures that the district court imposed.

II. OHIO'S PROCEDURES READILY SATISFY DUE PROCESS UNDER THE CIRCUMSTANCES

By promulgating Policy 111-07, Ohio has chosen to provide inmates who are identified as posing a serious threat to prison security with an extensive process before placing them in its highest-security facility, the OSP. That process, described in more detail below, is more than sufficient to protect whatever liberty interest a prisoner has in avoiding placement at OSP. Indeed, the States and the federal government are free to, and have, adopted a range of procedures to deal with the paradigmatic penological decision of when assignment to a supermaximum-security facility is warranted to protect prison security. A prisoner may be accorded less extensive process than Ohio has provided without violating the Constitution.

A. The Liberty Interest Respondents Possess, If Any, In Avoiding Placement At OSP Is Not Particularly Weighty

1. It is well established that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). For this reason, even a substantial adverse change in the lawful conditions of an inmate's confinement does not by itself trigger the protection of the Due Process Clause. *Id.* at 224-225; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976); *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460-461 (1989). Only when conditions are "qualitatively different from the punishment characteristically suffered by a person convicted of crime" has the Court held that the Due Process Clause, of its own force, creates a liberty interest requiring procedural protections. *Vitek* v. *Jones*, 445 U.S. 480, 493 (1980) (interest in avoiding transfer to mental institution); see *Washington* v. *Harper*, 494 U.S. 210, 221-222 (1990) (interest in being free from involuntary administration of psychotropic drugs).

Based on the recognition that a prisoner's liberty interests are substantially diminished by virtue of his lawful conviction and that "the decision where to house inmates is at the core of prison administrators' expertise," *McKune* v. *Lile*, 536 U.S. 24, 39 (2002) (plurality opinion), this Court has repeatedly held that the decision to transfer an inmate to a more restrictive facility does not trigger a liberty interest under the Due Process Clause. As the Court explained in *Meachum* in rejecting the claim that the State's transfer of prisoners to a maximum-security institution implicated the Due Process Clause, there is no liberty interest protecting against "transfer from one institution to another within the state prison system." 427 U.S. at 225. That is because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Ibid.* Accordingly, the disagreeable nature of life in another institution with "more severe rules" does not mean, in itself, that a liberty interest is implicated. *Ibid.* See *Montanye*, 427 U.S. at 242 ("The [Due Process] Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive."); *Olim* v. *Wakinekona*, 461 U.S. 238, 248 (1983) ("The reasoning of *Meachum* and *Montanye* compels the conclusion that an interstate prison transfer, * * * does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself."); *Greenholtz*, 442 U.S. at 11 ("[T]he inmate's hope that he will not be transferred to another prison, * * * is not protected by due process.").

A line of post-*Meachum* cases emphasized dictum in *Meachum* to suggest that the State itself could create a liberty interest cognizable under the Due Process Clause by limiting the discretion of prison authorities to effect a prison

transfer. See 427 U.S. at 228; *Montanye*, 427 U.S. at 243; *Olim*, 461 U.S. at 249. This Court rejected this "dictum in *Meachum*" in *Sandin*, 515 U.S. at 479, and changed the methodology for determining whether a State has created a liberty interest. Rather than focus on the wording of state laws to determine whether that language has created an enforceable interest, the *Sandin* Court held that it would look to whether the State has "created an interest of 'real substance,'" *id.* at 480, by imposing a "restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 484 (internal citations omitted).[5] Nothing in *Sandin*'s rejection of the focus on mandatory or discretionary regulations signals any retreat from the Court's consistent recognition that transfers between institutions of varying security does not create a liberty interest.

2. The court of appeals here held that transfer to OSP "constitutes an atypical and significant hardship under *Sandin*," because the conditions there are more burdensome than the conditions at other Ohio prisons, including for segregated inmates. Pet. App. 14a. The court observed that placement at OSP "is indefinite and reviewed only annually"; deprives prisoners "of all significant human contact"; and renders them "ineligible for parole." *Id.* at 21a. It is not at all clear, however, why a transfer from one high-security prison in Ohio to OSP clears *Sandin*'s threshold test, in light of *Sandin*'s reaffirmance of the holding in *Meachum* that

[5] Applying this methodology, the Court held that a Hawaii prisoner's placement in disciplinary segregation was not atypical because it "mirrored" the conditions of administrative confinement and because it did not "inevitably affect the duration of his sentence." *Sandin*, 515 U.S. at 486-487.

transfer to a higher-security prison does not implicate a liberty interest. *Sandin*, 515 U.S. at 483 (*Meachum* "correctly established and applied" due process principles); *id.* at 483 n.5 (noting that the abandonment of the *Hewitt* methodology did not require overturning the result in *Olim* where no liberty interest was found).[6] Nor does the fact that placement at OSP renders an inmate ineligible for parole necessarily create a liberty interest, because an inmate being considered for placement in OSP is unlikely to be found to deserve parole, *i.e.*, release into free society on the premise that the prisoner does not pose a continuing threat to public safety.

But even assuming for purposes of this case that Ohio has created a liberty interest, the court of appeals erred in concluding that that interest must "necessarily be of a weight

[6] Although *Meachum* involved a maximum-security facility rather than a "supermaximum" facility, the fact that the highest-security facility in a typical State is more restrictive than thirty years ago does not make it "atypical." While solitary confinement is undoubtedly different from other modes of confinement, see Brief for the United States as Amicus Curiae at 22 n.15, *Meachum* v. *Fano*, No. 75-252, *supra*, the proliferation of supermax facilities in the last twenty years to address the security needs of prisons nationwide demonstrates that today twenty-three hour lockdown for a substantial period of time is not "atypical." See Riveland, *supra*, at 2, 3; see also *Miller* v. *Henman*, 804 F.2d 421, 422-423 (7th Cir. 1986) (rejecting prisoner's claim that Due Process Clause requires hearing before transfer to USP Marion in part because that prison, where "prisoner is confined to his cell most of the day" and is "apt to be chained and closely guarded" when not so confined "is not 'qualitatively different from the punishment characteristically suffered by a person convicted of crime' ") (quoting *Vitek* v. *Jones*, 445 U.S. 480, 493 (1980)), cert. denied, 484 U.S. 844 (1987)); *Ajaj* v. *Smith*, No. 03-7874, 2004 WL 1663968 (4th Cir. 2004) (108 Fed. Appx. 743) (unpublished) (per curiam) (prisoner has no protected liberty interest in avoiding transfer to ADX Florence); *Thomas* v. *Gunja*, No. 03-1129, 2004 WL 2044311, at *2 (10th Cir. 2004) (110 Fed. Appx. 74) (unpublished) ("Plaintiff's transfer from USP Terre Haute to USP Florence did not impose atypical and significant hardship on Plaintiff in relation to the ordinary incidents of prison life.").

requiring greater due process protection" merely because it passes the *Sandin* threshold. Pet. App. 22a. First, *Sandin* speaks to whether or not an asserted liberty interest that does not arise from the Due Process Clause "of its own force" (515 U.S. at 484) receives *any* protection, but says nothing about the relative weight to assign a liberty interest that crosses the *Sandin* threshold. Second, the fact that a liberty interest is cognizable under the *Sandin* standard, as the court of appeals found here, but not under the Due Process Clause "of its own force," supports attributing that interest *less* weight, not more, when conducting the balancing required by *Mathews*.

Finally, even assuming a *Sandin*-based liberty interest is weighty, it does not necessarily follow that "greater" process is automatically due. That interest must still be balanced against the State's interest and evaluated in light of the nature of the challenged decision and the value and cost of additional process. The Court made this point clear in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 86 (1978), in which it held that a medical student who suffered a more severe deprivation than the suspended high-school students in *Goss* v. *Lopez*, 419 U.S. 565 (1975), was entitled to "far less stringent procedural" protection. See pp. 23-24, *infra* (discussing *Horowitz*).

B. Petitioners' Interest In Ensuring The Safety And Security Of Inmates And Prison Staff Is Compelling

The principal governmental interest in housing dangerous inmates at OSP is ensuring the safety of prison officials and inmates throughout the Ohio prison system. As this Court has emphasized, that concern is "perhaps the most fundamental responsibility of the prison administration" and entitled to great weight in the *Mathews* balancing. *Hewitt*, 459 U.S. at 472. Here, that interest is of particular importance. The State built OSP in response to a riot at what had

previously been its most secure prison facility. Pet. App. 2a; *cf.* Riveland, *supra*, at 5 ("In 1983, the deaths of two officers and an inmate resulted in [USP Marion's] conversion to indefinite administrative segregation, or lockdown."). More generally, supermax placements have responded to the intractable security problems posed by some inmates in even maximum-security prisons, which lack the specialized facilities and trained personnel available in supermax institutions.

The court of appeals improperly discounted petitioners' interest in promoting institutional security based on its conclusion that petitioners have an alternative "mechanism to assure safety, one which does not require extensive process, and which * * * is easily and swiftly reversible in the case of error: administrative segregation." Pet. App. 22a. That conclusion ignores that Ohio has made a judgment that transfer of disruptive prisoners to OSP serves the *long-term* interest in prison security. A series of interim placements may, in the judgment of prison administrators, create uncertainty and exacerbate any problems in prisoner adjustment to a new facility. That judgment is undoubtedly entitled to deference by the courts, see, *e.g.*, *Hewitt*, 459 U.S. at 472 (decisions regarding institutional security entitled to "wide-ranging deference"), which should not lightly substitute a different view that short-term measures to enhance prison security are adequate to meet the prison's needs, cf. *Overton* v. *Bazzetta*, 539 U.S. 126, 136 (2003) (reasonableness of regulation can be undermined by regulatory alternative only where that alternative, *inter alia*, does not impose "more than a *de minimis* cost to the valid penological goal").

C. The Court-Imposed Procedures Will Not Substantially Reduce The Risk Of Error In Petitioners' Placement Decisions

Ohio's Policy 111-07 affords inmates placed at OSP with more than sufficient process in light of the interests dis-

cussed above and the forward-looking and quintessentially discretionary nature of the inmate-transfer decision. Indeed, sound determinations in such prisoner-assignment decisions can be made without as elaborate a process as Ohio provides—as is demonstrated by a comparison to procedures used in the federal system.

1. Policy 111-07 establishes a three-tiered recommendation and review process for determining whether an inmate should be housed at OSP. The policy goes beyond the procedures approved by the Court in *Hewitt* by providing inmates with advance notice of the classification committee hearing and with the opportunity to be heard both in front of the committee and in writing after the Warden makes his placement recommendation to the Bureau of Classification. Pet. App. 127a-130a. Policy 111-07 also provides substantial process for OSP retention determinations. Each inmate's classification is reviewed within 30 days after he arrives at OSP and thereafter at least annually. Pet. App. 131a-132a, 137a-140a. Inmates are provided with advance notice of their "Annual Supervision Review" and with the opportunity to be heard both during the hearing and after the Warden makes his recommendation to the Bureau of Classification. *Id.* at 139a-140a.

The value of the additional requirements imposed by the district court "'would be too slight to justify holding, as a matter of constitutional principle[,]' that they must be adopted." *Hewitt*, 459 U.S. at 476 (quoting *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975)). The courts below principally mandated that Ohio supplement its process by: (1) providing inmates with an advance written notice that includes "an exhaustive list of the reasons to be considered for placement" and the evidence prison officials intend to rely on, on pain of barring prison officials from considering grounds or evidence not identified; (2) allowing inmates to call witnesses and present documentary evidence unless security interests would

be unduly compromised; (3) insisting that prison officials disclose as much information as possible about any testimony from confidential witnesses relied on; and (4) requiring decisionmakers to provide extensive written reasons for their decisions. Pet. App. 20a-21a. Those formal measures are out of place in the prisoner-transfer context and will not enhance decisionmaking.

Although the court of appeals noted that petitioners' regulations allow OSP placement "only in the presence of certain factual predicates" (Pet. App. 23a), review of Policy 111-07 makes clear that the decision is, at bottom, a predictive determination about the long-term security risk posed by the inmate that "turns largely on 'purely subjective evaluations and on predictions of future behavior.'" *Hewitt*, 459 U.S. at 474 (quoting *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981)). As this Court has explained, such assessments "necessarily draw on more than the specific facts surrounding a particular incident" because prison officials "must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Ibid.*; see *Meachum*, 427 U.S. at 225 ("Transfers between institutions * * * are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate."); Riveland, *supra*, at 9 ("Diagnosis, prediction, risk assessment, and identification of causal factors to violent acting out often defy objective criteria and invite a significant degree of subjectivity.").

Even outside the prison context, this Court has emphasized the distinction between decisions premised on fundamentally predictive judgments as opposed to the retrospective resolution of factual disputes. For example, in *Board of Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78 (1978), the Court held that a student dismissed from

medical school was not entitled to a hearing, because the school officials' judgment "that she did not have the necessary clinical ability to perform adequately as a medical doctor" was "by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." *Id.* at 89-90. The Court added that the decision at issue "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 90. In so holding, the Court "fully recognize[d]," *id.* at 86 n.3, that it had required greater process for a less severe deprivation in *Goss*, where the Court held that due process required that high-school students facing a ten-day suspension for disciplinary reasons be given notice and an opportunity to be heard.

Contrary to the court of appeals' assertion (Pet. App. 23a), nothing in Policy 111-07 "restrict[s]" petitioners' authority to consider subjective factors and to exercise experience-based judgments in deciding whether an inmate should be housed at OSP. In fact, the policy specifically requires the classification committee to "determine whether the inmate has met one of the [listed] criteria *and* whether the inmate should be placed in Level 5" (*id.* at 129a-130a) (emphasis added), thus making clear that the "factual predicates" referred to by the court of appeals, *id.* at 23a, are not the only factors to be considered and do not automatically trigger placement in OSP. Further, the portion of Ohio's policy addressing annual retention reviews lists numerous non-historical considerations and requires the committee to use its "professional correctional judgment to evaluate the inmate's likelihood to repeat prohibited actions." *Id.* at 138a-139a.[7]

[7] The court of appeals' focus on the details of the regulations and the restriction on the discretion of prison officials under the regulations essentially reintroduces the erroneous methodology this Court rejected in *Sandin*. The decision where to house an inmate is inherently discretionary and predictive. Even if that discretion is channeled through regulations that make historical facts relevant, that does not change the fundamental nature of the decision or give rise to additional constitutional protections.

Because petitioners' placement decisions ultimately turn on subjective judgments about prison management rather than on specific, disputed facts, "procedures designed to elicit specific facts," *Greenholtz*, 442 U.S. at 14—such as the requirements that inmates be allowed to call "reasonable witnesses" (Pet. App. 40a) and that they receive notice of "all the grounds believed to justify * * * placement" at OSP (*ibid.*) and "a detailed and specific justification" for each placement recommendation and decision (*id.* at 42a)—are unlikely to reduce the risk of erroneous placement decisions. See *Greenholtz*, 442 U.S. at 14 (formal hearing on highly discretionary parole-release decision "would provide at best a negligible decrease in the risk of error"). Instead, such requirements "would tend to convert the process into an adversary proceeding," *id.* at 15-16, and would threaten to hinder prison officials by encouraging them to focus on "mechanically complying with cumbersome, marginally helpful procedural requirements, rather than managing their institution wisely," *Hewitt*, 459 U.S. at 474 n.7.

2. The reasonableness of Ohio's procedures is underscored by comparing them to the Bureau of Prisons (BOP). In the federal system, inmates are housed at ADX Florence and USP Marion in conditions that are substantially comparable in the level of restriction to those at OSP. BOP's placement policy, however, differs from Ohio's in certain respects, the most salient being that a federal inmate does not receive a hearing before the placement decision (other than in the Control Unit). BOP's judgment that hearing from the inmate before the placement decision is unnecessary to en-

sure an effective placement policy supports Ohio's contention that the court-imposed modifications to Policy 111-07 will not enhance the quality of inmate-placement decisions. BOP's criteria for transfer are somewhat more general than Ohio's. For example, BOP's inmate-transfer policy provides that ADX Florence is "for those inmates who have demonstrated an inability to function in a less restrictive environment without being a threat to others, or to the secure and orderly operation of the institution." *BOP Program Statement No. 5100.07, Security Designation and Custody Classification Manual*, Ch. 10 (Jan. 31, 2002) (*Program Statement*) § 3(a)(1). And USP Marion "is reserved for inmates who have demonstrated an inability to adjust satisfactorily to general population units in other secure facilities." *Program Statement* § 3(a)(2).[8]

Although BOP, like Ohio, has a three-tiered review process for effecting an inmate's transfer to those facilities, the inmate does not directly participate in it unless and until the inmate challenges the decision in an administrative appeal. BOP makes placement decisions for its high security housing units through a process that is similar to its general classification and transfer procedures.[9]

BOP's policy provides that the Warden may propose an inmate transfer to Florence or Marion only "[i]f transfer to another institution is not appropriate[.]" *Program Statement* § 3(a)(3). The Warden must refer a transfer proposal to the Regional Director, whose concurrence is necessary for

[8] Like Ohio, BOP does not seek to transfer "[i]nmates currently diagnosed as suffering from serious psychiatric illnesses." *Program Statement* § 3(a)(3).

[9] Congress has given BOP broad discretion to make prisoner placement and transfer decisions, see 18 U.S.C. 3621(b); S. Rep. No. 225, 98th Cong., 1st Sess. 142 (1983), and has exempted such decisionmaking from judicial review under the Administrative Procedure Act, see 18 U.S.C. 3625.

the proposal to reach the North Central Regional Director, who makes the final decision. *Ibid.* The North Central Regional Director bases the transfer decision on consideration of the "referral packet," which must include "[a] memorandum from the Warden to the appropriate Regional Director with the specific rationale supporting the institution's recommendation"; "[c]opies of all disciplinary reports, investigative materials or other official documentation related to the behavior prompting the referral"; "[a] current Progress Report"; "the inmate's latest Presentence Investigation Report"; "[a] recent psychiatric or mental health evaluation" and "[a] memorandum from the Regional Director recommending the referral." *Program Statement* § 3(a)(4). The North Central Regional Director must document the final decision in a memorandum to the requesting Regional Director and Warden. *Program Statement* § 3(a)(5).[10]

Although the inmate does not directly participate in that referral process, he is apt to be familiar with the concerns prompting the referral, because he has the opportunity to communicate with his assigned Unit Team and he receives regular Program Reviews at which problems are discussed. See 28 C.F.R. 524.11 and 524.12. Moreover, an inmate may challenge a transfer decision via the Administrative Remedy Program. See 28 C.F.R. 542.10-542.19. That program provides the inmate with a formal administrative appeal process before the Warden, the Regional Director, and the National Inmate Appeals Administrator in BOP's Central Office, Washington, D.C.

Due process does not invariably require an opportunity to be heard in advance of a decision. See *Hewitt*, 459 U.S. at 476 & n.8 (providing inmate opportunity to be heard orally or

[10] The North Central Regional Director has the authority to place an inmate referred to USP Marion in ADX Florence and vice versa. *Program Statement* § 3(a)(5).

in writing within reasonable time after decision to place him in administrative segregation suffices); cf. *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988) (bank officer deprived of property interest by suspension not entitled to be heard until within reasonable time after suspension). Here, BOP has a strong interest in institutional safety and security, and reasonably concluded that a thorough administrative consideration, typically based on reports and records generated with information from the inmate (such as mental health evaluations, presentence reports, progress reports, and disciplinary reports), followed by a post-assignment opportunity for a prisoner to respond and be heard, provides sufficient process.[11]

BOP's longstanding judgment that prisoner placement decisions should be carried out by an administrative process involving prison officials, followed by an opportunity for a prisoner to be heard in an administrative appeal, demonstrates that formal, trial-type procedures are unnecessary to ensure sound decisionmaking in the interest of institutional security. The court of appeals' decision approving the district court's modifications of Ohio's already highly detailed set of procedures constitutes a misapplication of the *Mathews* factors to a decisionmaking process that should be left largely, if not entirely, to prison administrators.

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[11] To the extent a placement decision is based in part on disciplinary violations—the accumulation of which is a common basis for transfer—the inmate would have had an opportunity to challenge the finding of any such violations under the procedures set out in *Wolff*. See 28 C.F.R. 541.10-541.20.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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